

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-007

RALPH WILSON

APPELLANT

FINAL ORDER
SUSTAINING HEARING OFFICER'S
VS. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY

APPELLEE

** ** *

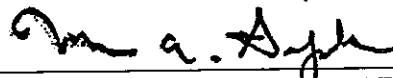
The Board at its regular August 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 14, 2015, Appellant's exceptions, Appellee's response, oral arguments and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 20th day of August, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Hon. Lawrence R. Webster
Kathy Marshall

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
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**TRANSPORTATION CABINET
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** ** *

This matter came on for evidentiary hearing on April 13, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Ralph Wilson, was present and represented by the Hon. Lawrence R. Webster. The Appellee, Transportation Cabinet, was present and represented by the Hon. William Fogle. Also present as Agency representative was J. R. Dobner.

At issue are Appellant's allegations that when he returned from directed sick leave, he was not returned to his previous position or duties as close as circumstances would permit pursuant to necessary accommodations, and there was also a failure of the Appellee to accommodate Appellant's disabilities. The burden was on the Appellant to prove his case by a preponderance of the evidence.

The rule separating witnesses was invoked and employed throughout the course of the proceeding. Appellant waived presentation of an opening statement. Appellee presented an opening statement.

The parties stipulated to the following facts:

- (1) One who is employed in the position of Office Support Assistant, a grade 12 position, has less opportunity for advancement than one employed in a Transportation Engineering Assistant II position, a grade 15.
- (2) Appellant's current employment position is Office Support Assistant.

BACKGROUND

1. The first witness for the Appellant was the Appellant, **Ralph Wilson**. Wilson is 55 years of age and has for the past 14 years been employed by the Kentucky Transportation Cabinet. He is currently employed as an Office Support Assistant (OSA) in District 12 where he answers telephones, sorts mail, and performs general office duties. He had been a Transportation Engineering Assistant (TEA) I for about 1.5 years and then a TEA II. Progression in that series would have been through the positions of TEA I, TEA II and TEA III.

2. Wilson was a TEA II before he was placed on leave. His job duties required him to safely operate a vehicle, examine contractor blueprints and write up what contractors had performed on the job site that day. He had to walk on pavement, as well as rocky surfaces and slopes, and take periodic tests. He has passed all tests required of him in his position. He had passed one of two tests required in the concrete materials area.

3. Wilson has had a diagnosis of Multiple Sclerosis (MS) since 1985. His condition has been stable. His treating physician for this condition is Dr. Everman who had sent a report to his employer (Appellant's Exhibit 1). That report confirms Appellant's diagnosis of MS and substantial impairment limiting one or more of his major life activities due to mild balance difficulties; difficulty with focus and concentration; and test anxiety. Appellant states these problems do not occur all the time and he takes medication for balance problems: one pill every twelve hours. He testified he has no problems with balance while on the job. He denied he has any loss of strength.

4. When he came off leave he was taken off construction and assigned a job in an office. He states he is capable of performing tech service jobs.

5. In April of 2014 he had been driving his state assigned vehicle, a Dodge pickup truck. This truck had signs of rust and a great deal of pre-existing body damage, particularly to the bumper. The bumper, previously damaged by another driver, was in the back of the truck.

6. He had pulled the truck up to a ditch at one job site. It had rained that day. The front tires started to slide down the ditch. The ditch was not marked off with any cones or with a dirt berm. He knew he could not back up, so he put his foot on the accelerator in order to have the truck land on all four tires. He landed at the bottom of the ditch, a 4' drop. An excavator came along and pulled the truck out. Due to this incident, the truck sustained some damage near the headlights. He stated this incident had no connection to his MS. He was suspended one day for this incident and did not appeal that disciplinary action.

7. He was asked to get repair estimates from three different places to repair the entire truck. He secured these estimates and asked the repair shops to provide one estimate for complete repair and another one for repair to the front of the truck only. (Appellant's Exhibits 2a, 2b, 3a, 3b, 4a, and 4b.)

8. He recalled an incident that occurred on a job site on Route 80 in Eastern Kentucky. His truck was on the side of the road and he wanted to leave the site. Two flaggers employed by the contractor flagged him to proceed and cross the road. He started to cross the road, but a truck was also coming his way. Both vehicles put on their brakes and stopped. Neither vehicle had to make a sudden stop nor had there been any screeching of tires.

9. There had been another incident where Mike Tramel, a contractor, had signaled Appellant to cross the road. Appellant was on foot on HWY 80. He saw a vehicle coming. He had been on the edge of the road and was about to step up on the curb. He did not trip or stagger. He was not dangerously close to any traffic.

10. He does not remember an incident where it was alleged he parked his vehicle on rebar. He also did not have any memory of turning a state vehicle around on a U-turn in front of a rock truck.

11. He testified he does get dizzy, but when that happens he is able to sit down and it passes in two to three minutes. He has no trouble figuring things out. He can perform all the functions of his job.

12. He identified Appellant's Exhibit 5 as the Job Specification for his position of TEA II.¹

13. He identified the following exhibits as certificates showing completion of certain requirements and qualifications; Appellant's Exhibit 6a – Work Zone Traffic Control Supervisor Qualification; Appellant's Exhibit 6b – Work Zone Traffic Control Technician Qualification; and Appellant's 6c – Grade and Drain Level 1.

14. Mr. Wilson requests he be restored to the position of TEA II so he may have the possibility of advancing through the tech series.

¹ This exhibit was, by agreement of the parties, substituted for an earlier submission of Appellant's Exhibit 5, that earlier submission having been a Job Specification that did not apply in this case.

15. The next witness was **Donell Kent**. For the past thirty-two years Mr. Kent has been employed by the Kentucky Transportation Cabinet as a Tech II. He is familiar with the incident where Appellant had run his truck into a ditch. That vehicle had "a lot" of pre-existing body damage. Appellant's incident resulted in a small air dam having been ripped off the front bumper.

16. He offered testimony that an employee named "Elrod" was in pretty bad physical shape. He was overweight, had bad knees and had trouble walking. Elrod still works on construction sites and had been a Tech II. Mr. Kent testified from hearsay that a Michael Blevins was working in Johnson County, still on the job on construction sites, despite having trouble with his legs.

17. Appellant rested his case.

18. The first witness for the Appellee was **Mary Westfall-Holbrook**. Ms. Westfall-Holbrook is employed by the Kentucky Transportation Cabinet as an Executive Director and Chief District Engineer in District 12. District 12 covers seven counties in Eastern Kentucky. She described her job duties including oversight of personnel.

19. A TEA works with Engineers and Technicians, assisting them with their duties. This includes conducting inspections, sampling, and safely operating a vehicle at construction sites.

20. Appellant indicated he was interested in getting into the Transportation Engineering Technologist (TET) series. The witness told him he would have to take on additional duties. At that time Appellant had been working in Materials. He was told he would have to take and pass the concrete test. Appellant wanted to work in Construction, rather than Materials.

21. She identified Appellee's Exhibit 1 as a November 8, 2013 e-mail she had sent to J.R. Dobner. This e-mail reflects the meeting she had with Appellant, having advised him what was expected of a TET I as well as the duties of that position.

22. At some point Shawn Ray contacted the witness to advise about problems that had occurred on construction sites with the Appellant. He had stopped his truck in front of an on-coming rock truck. On another occasion he had driven into a ditch. There were a number of safety concerns.

23. She spoke with J.R. Dobner in Frankfort for advice. They considered different places in the District and Section office for a best fit to move Appellant. Appellant had problems calculating volumes and concentrating. They were aware of his diagnosis of MS. Based on safety concerns, he was placed on the switchboard in the office.

24. She does not recall Appellant ever having asked for accommodations due to his MS. He always stated he could do his job. It was because Appellant had MS that she was led to believe that these safety issues would recur.

25. The next witness was **Mike Tramel**, who is an independent contractor. His company had performed excavation of a culvert for the state. His men had been working in the culvert when he picked them up and moved them to the next culvert about 500 yards away. It started raining. When he returned to the culvert he saw a truck had driven down into that hole. The hole is about nine feet deep and there had been no markings around it.

26. He was concerned about the Appellant's safety and the safety of the public. He knew of another incident where Appellant, while in his truck facing westbound on HWY 80, "hooked around" to make a U-turn. He could not make a full U-turn. A loaded truck had to stop. "It was a little scary." No one had flagged the Appellant out on to the highway.

27. There was another incident when Appellant drove his truck up on some rebar and tools. Tramel spoke to Shawn Ray and Paxton Weddington about these matters.

28. He witnessed another incident where he saw Appellant lose his balance on the side of the highway and stepped back. A lady in an approaching car had to stop her vehicle.

29. The next witness was **Timmy Dean Hill**. For the past twenty years Mr. Hill has been a part owner of Hi-View, LLC, a road construction company. His company performed construction projects for the Kentucky Transportation Cabinet. One such project last year had been on HWY 80 in Eastern Kentucky.

30. Hill saw the Appellant turn his vehicle in front of an on-coming loaded dump truck. No flaggers were involved. He became concerned for Appellant's safety and the safety of his company's equipment.

31. Tim Mills, Hill's project superintendent, and Mike Tramel, had also reported some incidents to him involving Appellant. Hill then wrote an e-mail to the Transportation Cabinet (Appellee's Exhibit 3). He was later asked to describe those incidents in more detail. He did so with a follow-up e-mail (Appellee's Exhibit 2). He requested Appellant be removed from the project.

32. **Timothy Wayne Mills** was the next witness. For the past ten years he has been employed by Hi-View as a supervisor. Mr. Wilson had been the inspector at the Elkhorn City HWY 80/460 project.

33. Wilson came down through the job site and drove his truck into a hole. They brought in an excavator to re-excavate the site so Appellant could drive the truck out. This gave Mills concerns as the men had just left that site. There were no cones or other markers around the hole at the time as the site was not open to the public. Previously, barrels had marked the hole.

34. **Shawn Ray** was the next witness. For the past eight months he has been the Construction Manager for Mountain Enterprises, an asphalt contractor. The previous six and a half years he was employed by the Transportation Cabinet as a Transportation Engineer I (TET I). He had been Ralph Wilson's direct supervisor when Appellant was a TEA II.

35. Ray worked with Appellant when Appellant wanted to advance into the TET series. He gave Wilson a list of duties and expectations. He tried to familiarize Appellant with the "pipe book." At the time, Appellant had been working on the night shift. They switched him to day shift to give him more opportunities to learn and greater possibilities to advance.

36. Ray received an e-mail from Mr. Hill. He then sought advice from Paxton Weddington, his supervisor. No one ever told him to take any steps to accommodate Appellant's MS.

37. The next witness was **James R. Dobner**. For the past two years Mr. Dobner has been employed by the Kentucky Transportation Cabinet as Policy Advisor. He has more than five years of previous Human Resources experience.

38. In October of 2012, Appellant had filed a grievance. He was a TEA II at the time and had been struggling to complete the concrete test. His supervisors had moved him to perform odds and ends and not TEA duties. Dobner identified Appellee's Exhibit 4 as an e-mail recording the first day he spoke with the Appellant. He sent an inquiry to Kathy Marshall.

39. They talked to Appellant's supervisors and again with Wilson. Appellant wanted to work in Construction and not Materials. It was decided moving him to Construction would free him from the ACI Certification requirement. In March of 2013, Appellant was moved to Construction in Pikeville. Mr. Wilson agreed to that move.

40. He identified Appellee's Exhibit 5 as a March 4, 2013 e-mail sent from Kathy Marshall which described the proposed move. He identified Appellee's Exhibit 6 as the May 28, 2013 e-mail he had sent to Mr. Wilson. He had phone conversations with the Appellant who was very interested in getting into the Tech I position. Dobner encouraged him to get his application together so it could be sent over to the Personnel Cabinet for a Minimum Qualifications Review (MQR).

41. He identified Appellee's Exhibit 7 as the May 28, 2013 e-mail he sent to Mary Holbrook regarding his efforts on behalf of the Appellant. He identified Appellee's Exhibit 8 as the June 6, 2013 e-mail he sent to Mary Holbrook. After additional conversations with the Appellant, Dobner realized Appellant had to redo his application from scratch. Mr. Wilson was to meet with Mary Parsons to get his application completed.

42. He identified Appellee's Exhibit 9 as the June 6, 2013 e-mails indicating progress on Appellant's matter.

43. He identified Appellee's Exhibit 10 as the July 3, 2013 e-mail he sent to the Appellant setting out specifically how to fill out a new state application. Mr. Wilson did not have a prior application in the current system. Dobner took the information from Appellant's old application and sent it in formatted form to Wilson.

44. He identified Appellee's Exhibit 11 as his July 11, 2013 e-mail to John Nix advising that Appellant had submitted his completed updated application.

45. He identified Appellee's Exhibit 12 as his July 24, 2013 e-mail sent to William Fogle. This e-mail reflects the witness' discussions with Appellant regarding the TET I position. He had asked Appellant's supervisors to give him additional duties for possible future reclassification.

46. He identified Appellee's Exhibit 13 as his October 28, 2013 e-mail to Mary Holbrook indicating that the Personnel Cabinet advised that as of October 1, 2013, Appellant met the minimum qualifications for the TET I position. He was to continue performing TET I duties before he could be reclassified.

47. With Wilson's consent he was, on January 1, 2014, moved from third shift to day shift in order to give him more experience opportunities.

48. It was about April of 2014 that Mr. Dobner was made aware that a request for disciplinary action had been sent to Kathy Marshall regarding Appellant having driven a truck into the ditch. This resulted in a one-day suspension (Appellee's Exhibit 14).

49. In June of 2014 he was made aware of allegations of safety issues pertaining to Appellant on the HWY 80 project. He received an e-mail from Tim Hill forwarded to him, which had no details, but requested Appellant be removed from the project. He asked for more details and was provided same in a subsequent e-mail.

50. Dobner wanted to get more information, particularly from Appellant's Dr. Everman. He asked Dinah Bevington if they could use special leave for investigative purposes to be able to move Appellant off the work site until they obtained more information. This would allow Appellant to go home, still be paid, and not have to use his own leave time. This was approved by the Personnel Cabinet and Appellant was placed on special investigative leave effective close of business June 27, 2014 (Appellee's Exhibit 15). During that time Appellant did not lose any pay or benefits.

51. He identified Appellee's Exhibit 16 as an e-mail reporting on the Appellant's progress. He identified Appellee's Exhibit 17 as the September 5, 2014 Medical Provider Report received from Dr. Everman.

52. On September 10, 2014, he called the State ADA Coordinator, Jennifer Hicks, to inquire about Wilson's situation. When it comes to accommodating MS, particularly involving cognitive issues, the employee may use a detailed checklist or use a tape recorder. The employee might also be afforded a flexible work schedule or more breaks. Dobner also viewed the Department of Labor's on-line accommodation network regarding available accommodations. It suggested that the work environment be made as stress free as possible. Dobner did not see how much structured order he could bring to a construction site.

53. Based on all the information he had, he believed Appellant was a "qualified individual" under the ADA. The next questions to be examined were "Is there available reasonable accommodation? Would such accommodation pose an undue hardship?" Dobner feared that if they tried a trial and error accommodation out in the field and got it wrong, it could have serious consequences. He determined Appellant could not perform the essential duties of his job either with or without accommodations.

54. He identified Appellee's Exhibit 18 as a September 11, 2014 e-mail from Paxton Weddington that listed the duties of a TEA II. Also attached to the e-mail were the Position Description and Position Demands Statement. Dobner surmised that 80 percent of the job duties would require Wilson to be on the job site.

55. Dobner had a concern whether Appellant could safely operate a vehicle on the job site. Attempting to provide him with accommodations would pose an undue hardship on the Cabinet. While Dobner did not consider the financial hardship to the Cabinet he did consider that Appellant, continuing to work with other employees, could interfere with their ability to perform their jobs.

56. He identified Appellee's Exhibit 19 as the September 5, 2014 e-mail he sent to update others on the progress in this matter.

57. He identified Appellee's Exhibit 20 as a September 10, 2014 e-mail he received from Amanda Reid. Dobner and Reid spoke with the State ADA Coordinator about four particular employees. With reference to Mr. Wilson, the ADA Coordinator suggested Wilson be placed in an administrative position to avoid possible dangers to himself and others while working on active constructive sites. Mr. Dobner testified that the first goal in accommodating an employee under the ADA was to try to keep the employee in their position with accommodations to enable the employee to perform the essential duties of the job. Should that not be possible, then the employer would look to reassignment. Mr. Dobner examined all the vacant positions available at that time in District 12 from a master list (Appellee's Exhibit 25). He noted that the OSA position was vacant and steps were taken to move Mr. Wilson to that position.

58. Effective September 22, 2014, Wilson was returned from special leave for investigative purposes and temporarily assigned from a TEA II, pay grade 10, \$2,257.68 per month, in the Department of Highways, District 12, Project Delivery and Preservation Branch 1, Pikeville Section, to the Department of Highways, District 12, Administrative Branch, as an OSA II, pay grade 8, \$2,257.68 per month. Such assignment was to remain in effect for a period not to exceed sixty calendar days. Wilson was notified of this by letter of September 23, 2014 (Appellee's Exhibit 21). He received the same rate of pay in this reassigned position as he did in his former position.

59. However, it had been realized that on September 1, 2014, Appellant had received his annual increment. That notation was corrected in a subsequent letter dated October 29, 2014, showing his monthly income to be \$2,325.42 per month (Appellee's Exhibit 22).

60. On November 12, 2014, Mr. Wilson was notified by letter that his temporary assignment was extended for a period not to exceed sixty calendar days (Appellee's Exhibit 23).

61. On January 16, 2015, Wilson was notified by letter that he was being placed on a detail to special duty from his position as a TEA II, grade 10, with a salary of \$2,325.42 per month to the position of OSA II in the Department of Highways, District 12, grade 8, at a salary of \$2,325.42 per month, effective January 21, 2015 (Appellee's Exhibit 24). Dobner stated that

if no other personnel action is taken, then on January 15, 2016, Mr. Wilson would revert back to a TEA II position.

62. Dobner believed there was nothing to link Appellant's MS with his having driven a truck into a ditch or making a U-turn into traffic. Other than certain disputed safety issues, he believed Wilson always performed up to his job expectations and requirements. He was concerned with the Appellant's own safety and the safety of others on the job sites. He was concerned about Appellant's dizziness while on the site and did not believe he would be safe. Appellant's trouble with focus and concentration was also an issue.

63. Appellee rested its case. Appellant presented no rebuttal testimony. The parties reserved presentation of closing arguments for their respective briefs. A separate briefing schedule was assigned by Interim Order.

FINDINGS OF FACT

1. Appellant, Ralph Wilson, is a classified employee with status. He has been employed by the Kentucky Transportation Cabinet for fourteen years. He had been a Transportation Engineering Assistant (TEA) I for 1.5 years. He then became a TEA II which required him to safely operate a vehicle, examine contractor blueprints, and write up contractor progress reports. His Job Specification was set out in Appellant's Exhibit 5 and is incorporated by reference herein, in its entirety, as **Recommended Order Attachment A**.

2. Mr. Wilson was diagnosed with multiple sclerosis in 1985. Mr. Wilson testified he does experience dizziness, but is able to have it pass by sitting still for two to three minutes. He also takes medication.

3. In April of 2014 Appellant drove a state pick-up truck to the edge of a ditch at a worksite. It had rained earlier that day and the truck began to slide. Appellant and his truck landed at the bottom of the ditch. Mr. Wilson received a one-day suspension for this incident. (Appellee's Exhibit 14.)

4. Shawn Ray, Construction Manager for Mountain Enterprises, an asphalt contractor, forwarded to Mary Westfall-Holbrook, Chief District Engineer for District 12, an e-mail he received from Tim Hill, co-owner of Hi-View LLC, a road construction company. (Appellee's Exhibit 2.) Hill complained that on the HWY 80 project, Appellant: (a) had driven his truck into the end of a box culvert; (b) twice, had turned his truck in front of oncoming loaded gravel trucks; (c) pulled his vehicle in front of an oncoming car; and (d) lost his balance and stumbled in front of an approaching car. Hill requested Wilson be removed from the project as Inspector.

5. In June of 2014, J.R. Dobner, Policy Advisor for the Kentucky Transportation Cabinet, was made aware of a number of safety concerns surrounding Appellant's presence at the HWY 80 project. He made inquiry with Dinah Bevington whether Appellant could be placed on special leave for investigative purposes until more information was obtained. The Personnel Cabinet approved placing Appellant on special leave for investigative purposes, which began June 27, 2014 (Appellee's Exhibit 15). During that leave Appellant remained at home, continued to be paid, and was not required to use his own leave time.

6. On September 5, 2014, Dr. Everman, Wilson's treating physician, provided a Medical Provider Report (Appellant's Exhibit 1 and Appellee's Exhibit 17). He confirmed Appellant's diagnosis of MS which substantially limited one or more of Wilson's major life activities: "Mild balance difficulties, difficulty with focus & concentration, & test anxiety." He indicated Appellant should be accorded reasonable accommodations in that he "needs extra time to take tests & to do multi-tasking at work; caution with climbing." Dr. Everman indicated the ideal work environment for mitigating the effects of Appellant's impairment by stating, "Important he continues to work but needs extra time to complete job duties." Wilson has never requested accommodations from the Cabinet until this Report from Dr. Everman.

7. Dobner contacted and conferred with Jennifer Hicks, the State ADA Coordinator, about this Report. He also researched relevant accommodations through the Department of Labor's on-line accommodation network. That information suggested the work environment be made as stress free as possible. Dobner did not see how structured order and reduction of stress at a construction site could be accomplished.

8. Dobner determined Appellant was a "qualified individual" under the ADA. He next examined whether reasonable accommodations were available and if such accommodations posed an undue hardship.

9. Dobner examined the duty expectations for a TEA II contained in a Position Demands Statement, an outline of expectations for a TEA II, and a Position Description, all sent to him by Paxton Weddington, Transportation Branch Manager (Appellee's Exhibit 18). Dobner determined 80 percent of Appellant's TEA II job duties required him to perform such duties on the job site.

10. Jennifer Hicks, State ADA Coordinator, who had participated in a September 10, 2014 telephone conference call with J. R. Dobner and Amanda Reid, suggested Wilson be placed in an administrative position to avoid possible dangers to himself and others while working on active construction sites. (Appellee's Exhibit 20.)

11. Dobner attempted to find reasonable accommodations to enable Wilson to perform the essential duties of his job. He determined no such reasonable accommodations were available. He followed the suggestions of Jennifer Hicks and looked into reassignment. After having examined the vacant positions available at that time in District 12 (Appellee's Exhibit 25), he noted the OSA position was vacant. He took steps to move Wilson to that position.

12. On September 22, 2014, Wilson was returned from special leave for investigative purposes and temporarily assigned from a TEA II, pay grade 10, \$2,257.68 per month, in the Department of Highways, District 12, Project Delivery and Preservation Branch 1, Pikeville Section, to the Department of Highways, District 12, Administrative Branch, as an OSA II, pay grade 8, \$2,257.68 per month. This assignment was to remain in effect for a period not to exceed 60 calendar days. (Appellee's Exhibit 21.) One who is employed in the OSA position has less opportunity for advancement than one employed in a TEA II position.

13. When Appellee realized Wilson had received an annual increment raise in pay on September 1, a corrected letter was sent to Appellant on October 29, 2014. (Appellee's Exhibit 22.)

14. Wilson was later notified by letter dated November 12, 2014, that his temporary assignment had been extended for a period not to exceed sixty days. (Appellee's Exhibit 23.)

15. By letter dated January 16, 2015, Wilson was notified that effective January 21, 2015, he was to be placed on a detail to special duty from his position as Transportation Engineering Assistant II, grade 10, with a salary of \$2,325.42 per month, to the position of Office Support Assistant II in the Department of Highways, District 12, grade 8, at a salary of \$2,325.42 per month. This detail is not to exceed one year. (Appellee's Exhibit 24.)

16. Appellant timely filed his appeal with the Kentucky Personnel Board.

CONCLUSIONS OF LAW

1. At issue are Appellant's allegations that when he returned from directed sick leave, he was not returned to his previous position or duties as close as circumstances would permit pursuant to necessary accommodations, and that there was a failure by the Appellee to accommodate Appellant's disabilities.

2. A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause. KRS 18A.095(1). At the time Appellant was placed on special leave for investigative purposes, he was a classified employee with status.

3. As defined by the Kentucky Revised Statutes, a “penalization” includes: “. . .any action that diminishes the level, rank, discretion, or responsibility of an employee without proper cause . . .” KRS 18A.005(24).

4. This case presents an unusual set of circumstances. The evidence is clear that Wilson had a longstanding diagnosis of Multiple Sclerosis. The evidence also showed that up until provision of a Medical Provider Report by Dr. Everman, Appellant never made a request for accommodations. It was not until June of 2014 that the Cabinet was made aware by a contractor that there were safety concerns involving Appellant’s presence and performance of his duties at a road construction site.

5. In June 2014, J. R. Dobner was made aware of a number of safety concerns on the HWY 80 project. These matters occurred subsequent to the April 2014 incident where Appellant had driven his state pickup truck into a box culvert and as a result received a one-day suspension.

6. Dobner took reasonable steps in determining how best to obtain additional information about the matter while not denying Appellant his regular pay. He made inquiry with Dinah Bevington at the Personnel Cabinet to determine whether Appellant could be placed on special leave for investigative purposes. The Personnel Cabinet approved that step and Appellant was placed on special leave beginning June 27, 2014. Appellant remained at home, continued to be paid, and was not required to use his own leave time.

7. In September 2014 Appellant’s treating physician Dr. Everman, provided a Medical Provider Report confirming Appellant’s diagnosis of MS and that he was substantially limited in one or more major life activities. Specifically, she identified Appellant’s mild balance difficulties, as well as difficulty with focus and concentration. (Appellee’s Exhibit 17.) Dr. Everman indicated Appellant required reasonable accommodations in the nature of extra time to take tests and to perform multitasking at work. Furthermore, Appellant was to exercise caution when climbing. No further or additional accommodations were requested or made known by the Appellant to the Cabinet.

8. With the information provided by Dr. Everman, Dobner again conferred with others. This time he counseled with Jennifer Hicks, the State ADA Coordinator. Based on what he learned, he assumed Appellant was a “qualified individual” under the ADA, and began to research viable accommodations through the Department of Labor’s on-line accommodation network. What he found on-line indicated that for someone with MS, the work environment should be made as stress free as possible. Dobner reasonably believed that a construction site was a stressful environment and attempting to structure order at such sites was not possible.

He began to examine whether reasonable accommodations were available and, if so, if such accommodations posed an undue hardship. He examined the duty expectations for a TEA II, as well as the Position Description and determined 80 percent of Appellant's job duties required him to perform such duties on the job site. He and Amanda Reid participated in a September 10, 2014 telephone conference call with Jennifer Hicks, State ADA Coordinator. Hicks suggested Wilson be placed in an administrative position to avoid possible dangers to himself and others while working on active construction sites.

9. Dobner determined that reasonable accommodations within the TEA II position were not available. He therefore followed the advice of the ADA Coordinator and examined the availability of vacant positions in District 12. He noted the OSA position was vacant and took steps to move Mr. Wilson to that position.

10. Wilson was returned from special leave for investigative purposes and temporarily assigned to the OSA II position with the same rate of pay. In November 2014 the temporary assignment was extended for a period not to exceed sixty days.

11. On January 16, 2015, Wilson was notified that effective January 21 he had been detailed to special duty to that same Office Support Assistant II position. Such detail is not to exceed one year. (Appellee's Exhibit 24.) According to Mr. Dobner's testimony, if no other personnel action is taken, Wilson will revert back to the TEA II position on January 15, 2016. (See also: Appellee's Exhibit 24).

12. This case requires examination of the facts in conjunction with the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Under the ADA, the following definitions are applicable:

Disability – The term “Disability” means, with respect to an individual – “[A] physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. §12102(1)1.(A). Dr. Everman stated in her report that Appellant does have a limitation to one or more of his major life activities.

Covered Entity – The term “Covered Entity” means “an employer . . .” 42 U.S.C. §12111(2). The Kentucky Transportation Cabinet, as an employer, is a “Covered Entity.”

Qualified Individual – The term “Qualified Individual” means “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered

evidence of the essential functions of the job.” 42 U.S.C. §12111(8). Such a written description did exist prior to Appellant having assumed the position of TEA II. The job specification was set out in Appellant’s Exhibit 5 and thus, is considered evidence of the essential functions of Appellant’s job.

Reasonable Accommodation – The term “Reasonable Accommodation” may include –

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. §12111(9).

13. No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C §12112(a).

The term “discriminate against a qualified individual on the basis of disability” includes –

- (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.

42 U.S.C. §12112(b)

The Sixth Circuit Court of Appeals, in *Kleiber v. Honda of America Mfg., Inc.*, 485 F.3d 862 (6th Cir. 2007) reiterated such prohibition and included the act’s definition of discrimination:

. . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . .

A reasonable accommodation is accomplished through an “interactive process.” 29 C.F.R. §1630.2(o)(3). The burden is on the affected employee to propose such accommodation. *Jakubowski v. Christ Hospital, Inc.*, 627 F.3d 195 (6th Cir. 2010). It was only after the request by the highway contractors to remove Wilson from the HWY 80 project site due to various safety concerns, that a medical report was secured and submitted by Appellant where, for the first time, Appellant made a request for certain accommodations. Dr. Everman specifically stated that the Appellant “needs extra time to take tests & to do multi-tasking at work; caution with climbing.” That it was “important he continued to work but needs extra time to complete job duties.” Also, that he “. . .requires test accommodations which he certainly meets criteria under ADA.” (Appellant’s Exhibit 1; Appellee’s Exhibit 17.)

14. Reasonable accommodation requires individual assessment in an interactive process. *Cripe v. City of San Jose*, 261 F.3d 877, 894 – 895 (9th Cir. 2001) [Where police departments practice of assigning disabled officers to only a narrow class of jobs, without individualized assessment, foreclose them from reasonable promotional opportunity, was condemned.] Employers are not required, however, to effect reasonable accommodation that causes undue hardship to the employer. 42 U.S.C. §12112(b)(5)(A). Nor does it require the elimination of an essential function of the job. *Hall v. United States Postal Service*, 857 F.2d 1073, 1078 (6th Cir. 1988). If an employee cannot perform an essential function of his job, he is not a “qualified individual” and the employer has no duty to accommodate. *Barber v. Neighbors Grilling U.S.A., Inc.*, 130 F.3d 702 (5th Cir. 1997). The employer is not required to provide accommodation if the individual poses a “direct threat” to the health or safety of himself/herself or others unless such accommodation would either eliminate such risk or reduce it to an acceptable level. *Deane v. Pocono Med. Ctr.*, 142 F.3d 138 (3d Cir. 1998).

15. A person is “an otherwise qualified individual” under the ADA when that person “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. §12111(8), *Brickers v. Cleveland Board of Education*, 145 F.3d 846, 849 (6th Cir. 1998). There are seven factors enumerated under 29 C.F.R. § 1630.2(n)(3) that are to be weighed in determining if a job function is essential:

1. An employer’s judgment that the function is essential;
2. written job descriptions;
3. the amount of time on the job devoted to perform the function;
4. the consequences of not requiring the employee to perform the function;
5. terms in a relevant labor agreement;
6. the work experience of those who have held the position in the past; and
7. the current work experience of those who hold similar jobs.

Several documents were admitted evidencing the essential functions of Appellant's job as a TEA II: Commonwealth of Kentucky Job Specification (Appellant's Exhibit 5); Outline of Expectations for a TEA II (Appellee's Exhibit 1); and Position Demands Statement with a Position Description Worksheet (Appellee's Exhibit 18). Dobner testified he had concluded, after examination of Wilson's essential job duties, that 80 percent of such duties required him to be present on a job construction site.

Among Wilson's essential job duties were: Operating a motor vehicle and Kinesthetic (balance and body movement) demands; oversight of construction project inspection activities on grade & drain . . . resurfacing . . . etc. (40 percent); exposure to dangerous work conditions including rough terrains (Appellee's Exhibit 18); work in the field and be exposed to risks inherent in working with large equipment and machines involved with road construction. (Appellant's Exhibit 5). Thus, Appellee gave consideration to item numbers 1, 2 and 3 under 29 C.F.R. § 1630.2(n)(3). No evidence was presented of any consideration given to items 4, 6 or 7. Item 5 is not applicable as there was no relevant labor agreement. Nevertheless, the employer determined that the above enumerated job duties, 80 percent of which are performed in active construction sites, were essential to the position of a TEA II.

16. After receiving the Appellant's request for accommodations, Appellee took a number of steps to determine whether Wilson could perform the essential functions of his employment position, with or without accommodations. Dobner at first considered the initial complaints from the road construction contractors about the safety risks posed by Wilson (Appellee's Exhibit 2). He examined information from Appellant's treating physician. He re-examined Appellant's job duties and determined the essential job functions. He entered into discussions of the matter with the State ADA Coordinator and the Chief District Engineer for District 12. After determining that 80 percent of Appellant's essential job function required him to be on an active road building construction site, and safely operating a motor vehicle, he decided Appellant could not perform his essential job duties with or without reasonable accommodation, and it was proper to be re-assigned to another job.

The evidence has shown that Dobner not only met with Appellant to assess his capabilities in view of his disability, but also conferred with the State ADA Coordinator, Jennifer Hicks, with the Personnel Cabinet, and with Mary Westfall-Holbrook, Chief District Engineer for District 12.

If an employer has a reasonable basis to believe an employee's medical condition poses a potential safety risk in the workplace, or that such condition poses a direct threat of endangering his own safety on the job, such may constitute the basis of concluding the employee cannot perform the essential functions of his job. *McClean v. Case Corporation, Inc.*, 314 F.Supp.2d 911, 919 (N.D. 2004). The Transportation Cabinet through its principals determined, after an

individual assessment, that Wilson's recent safety issues while operating a motor vehicle, and his balance problems, posed not only a danger to his own safety, but to the safety of the public as well as other workers at road construction job sites. As such, Wilson was unable to perform the essential functions of his job as a TEA II and, therefore, was not a "qualified individual" under the ADA.

17. Appellant has failed to prove by a preponderance of the evidence that his placement on special detail to the Office Support Assistant II position constituted any type of penalization. Furthermore, Appellant has failed to prove by a preponderance of the evidence that Appellee failed to reasonably accommodate his disabilities under ADA. The evidence clearly showed that in view of the safety concerns brought to Appellee's attention, Appellee took reasonable steps to examine reasonable, available accommodations for Appellant in his TEA II position, and, such accommodations not being available due to the nature of the duties and environment of the job sites, and a determination that Appellant posed a safety risk in the workplace, and that his condition posed a direct threat of endangering his own safety and the safety of others while on the job, the Cabinet, following the advice of the ADA Coordinator, placed Wilson on a detailed special duty in the position of Office Support Assistant II.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **RALPH WILSON VS. TRANSPORTATION CABINET (APPEAL NO. 2015-007)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Roland P. Merkel** this 14th day of July, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Hon. Lawrence R. Webster
Kathy Marshall

COMMONWEALTH OF KENTUCKY
JOB SPECIFICATION

APPELLANT'S
EXHIBIT

5

JOB TITLE: TRANSPORTATION ENGINEERING ASSISTANT II	
JOB CODE: 70770V131216 SYSTEM ID: 20001427	GROUP: 7000 - ENGINEERING AND GEOLOGICAL
SELECTION METHOD: QUALIFYING REV.: 05-08 EXAM NO.: NONE NO. OF TEST QUESTION: NONE	SALARY (MIN-MID): \$2,006.08 - \$2,657.70 GRADE: 10 SPECIAL ENTRANCE RATE: NONE
EXTENDED INITIAL PROBATIONARY PERIOD: NONE	

CHARACTERISTICS OF THE JOB: CHARACTERISTICS OF A JOB ARE GENERAL STATEMENTS INDICATING THE LEVEL OF RESPONSIBILITY AND DISCRETION OF POSITIONS IN THAT JOB CLASSIFICATION.

With the specific written approval of the State Highway Engineer, positions in this class are authorized and assigned to perform technical tasks in support of agency engineering programs and/or to coordinate the work of other sub-professional engineering or structures staff; and performs other duties as required.

MINIMUM REQUIREMENTS: MINIMUM REQUIREMENTS ARE COMPREHENSIVE STATEMENTS OF THE MINIMUM BACKGROUND AS TO EDUCATION, EXPERIENCE, AND OTHER QUALIFICATIONS WHICH WILL BE REQUIRED IN ALL CASES AS EVIDENCE OF AN APPOINTEE'S ABILITY TO PERFORM THE WORK PROPERLY.

EDUCATION: High school graduate.

EXPERIENCE: Must have two years of engineering-related experience, maintenance, construction, or experience on a structures crew.

SUBSTITUTION CLAUSE:

EDUCATION: Related technical or vocational training will substitute for the required experience on a year for year basis.

EXPERIENCE: NONE

SPECIAL REQUIREMENTS: (AGE, LICENSURE, REGULATION, ETC.)
Must possess a valid driver's license.

PRE-EMPLOYMENT REQUIREMENTS: EMPLOYEES IN THIS JOB WILL BE REQUIRED TO OBTAIN CREDENTIALS OUTLINED BELOW BEFORE BEGINNING EMPLOYMENT IN THIS JOB CLASSIFICATION. IT IS THE SOLE RESPONSIBILITY OF THE EMPLOYING AGENCY TO VERIFY THE ATTAINMENT OF THESE CREDENTIALS BEFORE THE EMPLOYEE BEGINS EMPLOYMENT IN THIS JOB CLASSIFICATION. COPIES OF THE CREDENTIALS OUTLINED BELOW MUST BE SUBMITTED TO THE PERSONNEL CABINET WITH APPOINTMENT PAPERWORK FOR REVIEW AND INCLUSION IN EMPLOYEE PERSONNEL FILE.

NONE

POST-EMPLOYMENT REQUIREMENTS: EMPLOYEES IN THIS JOB WILL BE REQUIRED TO OBTAIN CREDENTIALS OUTLINED BELOW WITHIN A REASONABLE TIME, OR IF EMPLOYEES POSSESS SUCH CREDENTIALS AT THE TIME OF HIRE THEY WILL BE REQUIRED TO MAINTAIN THOSE CREDENTIALS SO LONG AS THEY ARE EMPLOYED IN THIS CAPACITY. IT IS THE RESPONSIBILITY OF THE EMPLOYING AGENCY TO VERIFY THE ATTAINMENT AND/OR MAINTENANCE OF THESE CREDENTIALS, TO REMOVE FROM THIS CLASS ANY EMPLOYEE WHO DOES NOT ATTAIN OR MAINTAIN THESE CREDENTIALS, AND TO ASSURE THAT ANY EMPLOYEE WHO PERFORMS THESE FUNCTIONS, WITHOUT REGARD TO THE CLASS THEY ARE IN, HAVE THE APPROPRIATE CREDENTIALS.

Must maintain a valid driver's license for the length of employment in this job.

EXAMPLES OF DUTIES OR RESPONSIBILITIES OF THE JOB CLASSIFICATION: EXAMPLES OF DUTIES OR RESPONSIBILITIES ARE NOT TO BE CONSTRUED AS DESCRIBING WHAT THE DUTIES OR RESPONSIBILITIES OF ANY POSITION SHALL BE AND ARE NOT TO BE CONSTRUED AS LIMITING THE APPOINTING AUTHORITY'S ABILITY TO ADD TO, OR OTHERWISE ALTER THE DUTIES AND RESPONSIBILITIES OF A POSITION. THE USE OF AN INDIVIDUAL EXPRESSION OR ILLUSTRATION AS TO DUTIES OR RESPONSIBILITIES SHALL NOT BE REGARDED AS EXCLUDING ASSIGNMENT OF OTHERS NOT MENTIONED WHICH ARE OF SIMILAR KIND OR QUALITY.

Assists in performing duties that were learned in the Transportation Engineering Assistant I position or from other similar experience. Responsible for performing duties where employee provided assistance in the Transportation Engineering Assistant I position or from other similar experience. Oversees work of others for duties similar to those performed in the Transportation Engineering Assistant I position or from other similar experience. Oversees basic surveying activities for roadway location surveying and construction surveying. Operates medium type (transit and level) surveying equipment. Learns to operate complex surveying equipment. Establishes centerlines, takes cross-sections and determines elevations. Records field data and makes calculations. Meets with property owners to obtain information or permission to survey. Oversees basic quality assurance materials sampling and testing such as concrete slump and temperature and asphalt content and density. Operates equipment and performs higher level performance tests on materials and/or soil such as tests to determine penetration, flash point, specific gravity, ductibility, and/or solubility. Completes materials testing report forms. Serves as quality assurance inspector for multiple activities of construction work such as laying pipe, bridge painting, concrete coring, earthwork, paving asphalt and guardrail installation for compliance with plans and specifications. Oversees work of others who inspect single activities. Draws/plots preliminary maps and sketches from survey field notes and on final plans. Evaluates the project tasks, certifications of tests and inspections, project costs and material usage. Completes daily inspection reports. Reviews and monitors Contractor Quality Control Plans. Plots moderate/intermediate level roadway alignments and profiles. Oversees work of others who plot simple alignments and profiles. Formats and enters engineering data from the field into computer for use in analysis. Reads engineering plans and specifications for construction, maintenance and repair of roadways and bridges. Performs moderate/intermediate calculations of quantities of materials and cost estimates and checks others' calculation of quantities. Conducts traffic counts including the proper classification of vehicles, the designation of vehicle movement at intersections and the use of radar equipment for speed studies. Conducts HPMS adequacy and railroad crossing rating. Assists with operation of core drill for collecting geological data. Plots and checks topography and alignment electronically for engineering plans. Reduces and checks field notes. Performs inspection, record keeping and prepares reports relating to larger more complex utility relocation or construction. Uses computer in all applications

when available. Serves as crew leader or construction project oversees and coordinates the work of other sub-professional positions authorized to perform routine engineering tasks on a regular basis. Trains new employees. Assists as a functioning member of a bridge inspection team. Learns computer and software skills related to National Bridge Inspection Standards data collection, inspection report compilation, and data transfer. Assists in maintaining and organizing district bridge files. Learns bridge components, nomenclature, and simple bridge mechanics. Attends required training classes.

TYPICAL WORKING CONDITIONS AND UNIQUE PHYSICAL REQUIREMENTS: INCUMBENTS IN THIS JOB WILL TYPICALLY PERFORM THEIR PRIMARY JOB DUTIES UNDER THESE CONDITIONS, HOWEVER, THESE CONDITIONS MAY CHANGE ON OCCASION IN PERFORMING THE DUTIES OF AN INDIVIDUAL POSITION.

Work is performed in the field. Travel may be required. Incumbent must be able to lift, climb, crawl, carry, stand for long periods, stoop and walk long distances. Incumbent will be exposed to risks inherent to working with large equipment and machines involved with road construction.

ADDITIONAL REQUIREMENTS:

Applicants and employees in this job title may be required to submit to a drug screening test and background check. Applicants and employees in positions which perform job duties that may require contact with offenders in the custody or supervision of the Department of Corrections or with youth in the care, custody, or supervision of the Department of Juvenile Justice must meet qualifications pursuant to the federal Prison Rape Elimination Act, 28 C.F.R.115.17 and 115.317."

JOB ESTABLISHED: 09/16/1984	LAST REVISION: 12/16/2013
THE COMMONWEALTH OF KENTUCKY DOES NOT DISCRIMINATE ON THE BASIS OF RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, DISABILITY, SEXUAL ORIENTATION, GENDER IDENTITY, GENETIC INFORMATION OR VETERAN STATUS. REASONABLE ACCOMMODATIONS ARE PROVIDED UPON REQUEST.	